No. 47.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

## REPLY BRIEF FOR PETITIONER.

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.

Blurb Law Printing Co., Inc., 415 N. Eighth Street, CEntral 1-1473.

## INDEX.



### Cases Cited.

No. 47.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

## REPLY BRIEF FOR PETITIONER.

### ARGUMENT.

The Government argues that the available materials indicate that Congress intended conspiracy to be separately punishable, that the separateness of conspiracy and substantive offenses "has too long and too well established a history to be ignored" and that the concept "that combination for criminal purposes can be more dangerous than the consummated acts performed individually" applies with peculiar force to the anti-racketeering laws.

But the available materials do not indicate that Congress intended cumulative punishment. While Congress did not choose to make the substantive offense require, by definition, more than one participant, yet its chief concern was to punish wrong-doings which usually involved more than one participant. From its beginnings in the legislative hearings in 1933, the Anti-Racketeering Act was directed against combinations for criminal purposes and was not enacted against the efforts of a lone wrongdoer. The legislation was not designed to punish extortion or robbery as such but was intended to punish activities which interfere with interstate commerce. The restraint of commerce is the unit of prosecution and when this is single the punishment should likewise be single.

The Government itself recognizes that the Act was designed to provide a substitute for the attempt to prosecute racketeering under the Sherman Act. The only reason that combination was eliminated as an element of the substantive offense was to ease the burden of proof. The memorandum of the Special Assistant to the Attorney General recognized that "it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a conspiracy in restraint of such commerce" and that such restraints were to be punishable "whether the restraints are in the form of conspiracies or not" (See petitioner's brief pp. 17-19). The prime purpose for redrafting the bill after it passed the Senate in 1934 was the fear of its application to labor combinations. Therefore the Attorney General's second draft contained a proviso preserving the rights of labor organizations. This draft, retained both the indefinite imprisonment and fine provisions of the original version, again indicating no cumulative punishment was intended or needed.

We agree with the Government that subsections (c) and (d) of Section 2 of the 1934 Act were designed to cover a person who could not be shown to have obtained a "pay

off". The Government concedes that subsections (a) and (b) of Section 2 were intended as alternate offenses. It contends that subsections (c) and (d) were not so intended and that if a person who violated (a) or (b) also found it necessary to use the specific means defined in (c) or (d), he was properly subject to cumulative sentences.

The specific means mentioned in subsection (c) was violence or a threat of violence in furtherance of a plan or purpose to violate (a) or (b). But (a) and (b) both forbade violence. Indeed the Attorney General's letter accompanying the second draft itself states that "the typical activities affecting interstate commerce are those in connection with price-fixing and economic extortion directed by professional gangsters" and such activities were made unlawful "when accompanied by violence"[1] (See petitioner's brief pp. 20-21).

The Attorney General's second draft also added subsection (d) prohibiting both concerted acts and conspiracy. The Government argues that this clause was designed to increase the punishment provided by the general conspiracy statute. But subsection (d) punished concerted action such as aiding, abetting or counseling even in the absence of a conspiracy or a "payoff". The United States ignores the issue as to whether subsection (d) punished the same type of conspiracy as the general conspiracy statute which requires the commission of an overt act, that a conspirator do an act "to effect the object of the conspiracy." Subsection (d) on its face did not require an overt act to complete the offense but proscribed against a common law conspiracy.[2]

---

[1] A further indication that the specific means defined in (c) or (d) were not intended for cumulative sentence is that the specific language used in (c) was employed in haec verba in subsection (a) of the second draft which was stricken on the floor of the House. See Appendix pp. 3-5.

[2] See *Nash v. United States*, 229 U. S. 373, 376-378; *Singer v. United States*, 323 U. S. 338, 340.

The initial draft of the 1934 Act showed an intention to ease the proof by making combinations unnecessary. Subsections (c) and (d) were further manifestations of a desire to ease the proof by making inchoate crimes punishable. This was done without any intent to increase punishment. As we have already pointed out, the maximum punishment provision of the second draft, as in the initial version, was an indefinite fine and 99 years imprisonment. These drafts show that Congress intended to reach all violators, leaving to the discretion of the Court the fixing of penalties in relation to the severity of the crime.

The memorandum of Walter Rice, the Special Assistant to the Attorney General, and the subsequent letter of Attorney General Homer Cummings together leave the conclusion that the initial intent was not to punish a conspiracy as such and that the subsequent intent was to include a common law conspiracy, if the crime was inchoate. The statement of the Attorney General that "We have added a new provision prohibiting conspiracy as well as the substantive acts" does not indicate that prior to that time a conspiracy to violate the act was punishable. Indeed a common-law conspiracy was not punishable. Certainly, the memorandum and the letter when read together do not indicate an intent to increase the punishment from the two year limit which the general conspiracy statute at that time provided for an overt act crime.

Nothing in the 1946 Act or its history warrants the inference that aggregate punishment was desired. Again the main concern of Congress was with combinations, the exemption of labor organizations. The sponsor, Mr. Hobbs, assured Congress that 20 years was the maximum penalty, a penalty which he arrived at by looking at state law, primarily the law of New York, where a combination for unlawful purposes was considered in itself to be a minor crime.

The 1946 version defines in Sections 3, 4 and 5 crimes which are an incomplete stage of the offenses proscribed by Section 2. While the Government concedes that Section 4, the attempt provision, does not provide for additional punishment. It would have the other sections so provide. Of course that section prohibited not only an attempt but also punished anyone who "participates in an attempt to do anything in violation of Section 2." Apparently this also was designed to cover concerted action. Otherwise it would have been limited to whoever attempts to violate the section.

The fact that Congress in 1946 chose to double the punishment for a violation does not afford support for a conclusion that cumulative punishment was now intended. This increase in penalty does not create an inference that Congress at the same time intended not only a 20 year maximum but cumulative punishment with a maximum of 40, 60 or 80 years if the means of interfering with interstate commerce violated more than one subsection. In **Gore v. United States**, 357 U. S. 386, this Court reexamined the decision of **Blockburger v. United States**, 284 U. S. 299. It concluded that the Court in the **Blockburger** case was not unaware of the legislative materials in holding that narcotics violations may be cumulatively punishment, finding support in the fact that there were "three different enactments, each relating to a separate way of closing on illicit distribution of narcotics, passed at different periods, for each of which a separate punishment was declared by Congress." Here we have one enactment dealing with a single way of punishing racketeering. While the Act was changed twice, one amendment was designed to close a gap by eliminating an exception for certain labor union activity and the other amendment was part of a general revision of the entire criminal code.

Indeed the 1948 codification of the criminal laws itself indicates that the instant conspiracy section was not de-

signed to increase the punishment prescribed by the general conspiracy statute if a conspiracy was directed at a violation of the Anti-Racketeering statute. The Hobbs Act was excluded from the Reviser's specific mention of the particular sections of the Criminal Code, Title 18, retained to provide special punishment provisions commensurate with the gravity of the crime. Again, this shows the uniqueness of this statute and the inapplicability of doctrinaire considerations.

The Government does not argue that the entire statute was not directed primarily against criminal combinations. Rather it contends that the "controlling gloss" of this case are judicial decisions relative to the crime of conspiracy under the general conspiracy statute and the substantive offense committed thereunder, and it argues that the doctrine of such cases cannot be ignored. The issue is not the separateness of a conspiracy under the general conspiracy statute and its substantive offense but whether Congress under the Anti-Racketeering Act intended aggregate punishment for the conspiracy and its resulting completed crime. Since we are not concerned with the general conspiracy statute and its resulting substantive crime, its history sheds little light in expounding this particular legislation. And as we have pointed out, an overt act conspiracy is different from a common law conspiracy. This Court should not assume in the absence of legislative evidence that Congress meant to impose a 20 year penalty for a conspiracy which did not manifest itself by an overt act and intended an additional penalty of 20 years for its consummation. Moreover, the Government ignores the prime purpose of the statute in 1934 and again in 1946 was to penalize group and concerted effort interfering with commerce. The Government chooses to overlook that the sponsor of the 1946 Act, Representative Hobbs, specifically stated that the 20 year penalty was a maximum, and that the Court should decide the penalty within such limits

according to the gravity of the crime. The controlling gloss is not the judicial doctrine but the dominant motive to protect interstate commerce from interference by organized combinations "whether the restraints are in form of conspiracies or not."

At best the Government's approach is speculative. If the available materials do not support petitioner, the principles of lenity as expressed in **Ladner v. United States**, 358 U. S. 169, 178, are applicable:

> "* * * This policy of lenity means that the court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. * * *"

## CONCLUSION.

For the reasons set out above and for those set out in petitioner's original brief, the judgment below should be reversed.

Respectfully submitted,

MORRIS A. SHENKER,

SIDNEY M. GLAZER,
Attorneys for Petitioner.